

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1462-FT
STATE OF WISCONSIN**

Cir. Ct. No. 2009CV1718

**IN COURT OF APPEALS
DISTRICT II**

CITIMORTGAGE, INC.,

PLAINTIFF-RESPONDENT,

V.

MICHAEL W. HOBACH,

DEFENDANT-APPELLANT,

JENKINS & VOJTISEK AND SUE A. HOBACH,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Racine County:
MICHAEL N. NIESKES, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Michael W. Hobach appeals from a judgment of foreclosure in favor of CitiMortgage, Inc. Hobach argues that summary judgment

was improper because CitiMortgage failed to establish that it held and was entitled to enforce the note and because there was no proof of service of the amended foreclosure complaint on Hobach. Hobach additionally contends that the trial court erroneously denied his motion to amend the pleadings. Pursuant to a presubmission conference and this court's order of July 25, 2012, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).¹ After briefing, CitiMortgage submitted a letter of supplemental authority, to which Hobach filed a response. Upon review of the memoranda, supplemental letters, and the record, we affirm the judgment of the trial court.

¶2 Hobach borrowed money from Hartford Financial Services and secured the debt with a mortgage on his residence. Hartford assigned the loan and mortgage to CitiMortgage, who subsequently filed a foreclosure complaint based on Hobach's default. Hobach filed a pro se answer and eventually CitiMortgage filed an amended complaint adding additional defendants.² Attached to the amended complaint were various loan documents, including copies of the original note and mortgage and an allonge assigning the note from Hartford Bank to CitiMortgage.

¶3 CitiMortgage filed a new summary judgment motion along with a supporting affidavit from Denah Gramolino, a document control officer employed at CitiMortgage. The Gramolino affidavit described the nature of Hobach's

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The procedural history is complicated. Though the trial court granted summary judgment on the original complaint, the judgment of foreclosure was vacated on CitiMortgage's motion for reasons irrelevant to this appeal.

default and the amount due on the loan and averred that CitiMortgage held the note. One month later, Hobach filed several documents, including a brief opposing summary judgment and a motion for leave to amend the pleadings to include an amended answer, affirmative defenses, and counterclaims. Hobach's motion was premised on the claim that after the first foreclosure judgment was vacated, he entered into an agreement with CitiMortgage pursuant to the Homeowners Affordable Mortgage Program (HAMP), wherein CitiMortgage agreed to modify the loan and stop foreclosure proceedings if Hobach made a series of timely payments. By affidavit, Hobach testified that he made four timely payments in 2010 and that CitiMortgage refused his fifth payment without explanation. Hobach's motion to amend claimed that these transactions with CitiMortgage supported various equitable affirmative defenses and counterclaims.

¶4 The trial court denied Hobach's motion to amend the pleadings. Noting that by Hobach's own admission the alleged HAMP transactions occurred back in 2010, the trial court concluded that there was undue delay in waiting until 2012 to amend the pleadings. The trial court also concluded that the asserted affirmative defenses and counterclaims lacked viability because Hobach failed to establish the existence of a loan modification agreement under HAMP, and none of the proposed pleading amendments would actually serve as a legal defense to the foreclosure action. The trial court further determined that Hobach's motion was at least partially filed in bad faith because it asserted that "on information and belief, [CitiMortgage was] not the holder of the note and mortgage and is unable to enforce it." The trial court found this "astounding" given that the pleadings of both parties demonstrated that CitiMortgage held the note. The trial court observed that not only had Hobach signed a loan modification agreement explicitly acknowledging CitiMortgage's status as the note holder, but his own

proposed counterclaims asserted that CitiMortgage had treated him unfairly, a near concession that CitiMortgage was the lender.

¶5 The trial court then granted summary judgment in favor of CitiMortgage, concluding that CitiMortgage had established proper service of the amended complaint and its right to enforce the note through the documents attached to its pleadings, including the Gramolino affidavit. A foreclosure judgment was entered on May 14, 2012.

¶6 Hobach first argues that CitiMortgage never established service of the amended complaint. We disagree.³ By statute, the filing of the amended complaint constituted certification of service on Hobach, and it was Hobach's burden to prove nonservice. *See* WIS. STAT. § 801.14(4). Notably, Hobach's affidavit in support of his motion to amend the pleadings never avers that he failed to receive the amended complaint. Further, the trial court found that service by mail was not just presumed but had also been accomplished. At the summary judgment hearing, the trial court inquired of CitiMortgage whether it had proof of service and CitiMortgage stated it had an affidavit of mailing "here in our file" reflecting service on January 21, 2010. During this exchange on the record, Hobach did not express any doubt that the amended complaint was properly mailed. While Hobach complains that the affidavit of mailing was not made part of the record, again, it was his burden to demonstrate nonservice.

³ It appears that Hobach's nonservice claim would be relevant only to rebut a claim by CitiMortgage that Hobach failed to answer the complaint and was therefore subject to a default judgment. Our opinion does not reach the issue of default because we conclude that summary judgment was proper. Because the parties address the service issue and to the extent the parties conflate their arguments concerning default and summary judgment, we will briefly address their arguments.

¶7 Having dispensed with Hobach's nonservice claims, we also reject his argument that CitiMortgage failed to establish a prima facie case that it was entitled to enforce the note. We review a grant of summary judgment independently, using the same methodology as the circuit court. *Hardy v. Hoeffler*, 2007 WI App 264, ¶6, 306 Wis.2d 513, 743 N.W.2d 843. The summary judgment methodology is well established and need not be repeated here. See, e.g., *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-23, 241 Wis.2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. *Id.*, ¶24. We view the materials in the light most favorable to the party opposing the motion. *Id.*, ¶23.

¶8 In support of its amended foreclosure complaint, CitiMortgage provided: (1) a copy of the original note along with an endorsement from Hartford to CitiMortgage; (2) a copy of the original mortgage; (3) a lien report documenting the assignment of the mortgage to CitiMortgage and demonstrating that its lien was recorded on October 9, 2008; and (4) a loan modification agreement between Hobach and CitiMortgage which was signed by Hobach and acknowledged that CitiMortgage "is the holder and the owner of the Note." The signed loan agreement also acknowledged that the note was secured by a mortgage on Hobach's residence. In addition, as part of its summary judgment motion, CitiMortgage filed the Gramolino affidavit, which averred that CitiMortgage was the holder of the note.

¶9 Hobach complains that this proof was insufficient for a number of reasons, all of which we reject. Citing only to his trial brief in opposition to summary judgment, Hobach argues that the loan documents included in CitiMortgage's pleadings were insufficient because they were not certified.

Putting aside the fact that the attached note is stamped a “true and certified copy of [the] original,” there is no requirement that the loan documents be certified in order to be admissible. The note and its endorsement are contracts offered as evidence of a legal act and are not hearsay. *See Lyon Fin. Servs., Inc. v. Fernando*, No. 2011AP222, unpublished slip op. ¶15 (WI App Nov. 10, 2011). Further, these documents are presumed to be authentic and authorized. *See* WIS. STAT. § 403.308(1).

¶10 Hobach next contends that the Gramolino affidavit failed to demonstrate the requisite personal knowledge that would permit its admissibility at trial. In response, CitiMortgage filed a letter of supplemental authority citing to *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, ___ Wis. 2d ___, ___ N.W.2d ___,⁴ a recent case addressing the circumstances under which a bank employee’s affidavit would suffice to establish the bank’s right to enforce a note for purposes of summary judgment. In *Bierbrauer*, the court concluded that a bank employee had adequate personal knowledge to aver that PNC was the current noteholder where the affidavit established that the bank had possession of the loan records and that the affidavit was based upon the affiant’s inspection of those records. *Id.*, ¶10.

¶11 We are sufficiently persuaded that, given the particular facts of this case and considering the reasoning in *Bierbrauer*, CitiMortgage established itself as the noteholder. By affidavit, Gramolino testified that she is an employee of CitiMortgage, that CitiMortgage possesses records relating to Hobach’s loan, and

⁴ At the time CitiMortgage filed its letter, *PNC Bank, N.A. v. Bierbrauer*, No. 2012AP456, unpublished slip op. (WI App Nov. 20, 2012), had not been ordered published. The opinion was ordered published on January 30, 2013.

that Gramolino has personal knowledge of how such records are kept and maintained. Gramolino's affidavit established that she had access to those records and that based on her review she determined that CitiMortgage was the noteholder. Gramolino's affidavit established adequate personal knowledge to permit her testimony that CitiMortgage holds the note at issue. Hobach provided nothing to rebut the affidavit testimony that CitiMortgage is the holder of the note. That the relevant loan documents were in fact attached to CitiMortgage's complaint further supports Gramolino's affidavit.

¶12 Hobach attempts to distinguish *Bierbrauer* by pointing out that the loan documents attached to PNC Bank's complaint were "certified copies." *Id.*, ¶2. As discussed above, contracts need not be certified in order to be admissible. Further, in *Bierbrauer*, the loan documents failed to name PNC as the noteholder and the respondents, in answering the complaint, explicitly demanded "proof that [PNC] is the proper holder of the note and mortgage." *Id.*, ¶¶2-3. PNC Bank's affidavit was designed to repair the evidentiary gap. In contrast, the attached loan documents in the present case demonstrated CitiMortgage's interest on their face, and Gramolino's affidavit merely provided additional evidentiary support. CitiMortgage established itself as the noteholder with the right of enforcement through the attached loan documents as confirmed by the Gramolino affidavit. Because CitiMortgage established that it held the note, it has the right to enforce the note and also the mortgage, which follows the note by operation of law. *See Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1977) (when a note is transferred or assigned, the equitable interests in the mortgage follow).

¶13 Finally, we conclude that the trial court properly exercised its discretion in denying Hobach's motion for leave to amend the pleadings. Whether

to grant a party leave to amend the pleadings is a discretionary determination left to the trial court and is reviewed only for an erroneous exercise of discretion. *Hess v. Fernandez*, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. Here, the trial court found that Hobach’s late filing was the result of undue delay, that his proposed defenses and counterclaims were futile, and that his motion involved bad faith. The trial court’s findings and conclusions are supported by the evidence in the record, including that Hobach failed to provide any evidence of a loan modification agreement with CitiMortgage under HAMP and that he remained delinquent on the payment of his property taxes. The trial court “examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Id.*

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

